

Summaries of Nebraska Supreme Court and Court of Appeals Decisions on Workers' Compensation Cases

Fiscal Year 2002: July 1, 2001 to June 30, 2002

Supreme Court Cases:

1. Foote v. O'Neill Packing et al., 262 Neb. 467, 632 N.W. 2d 313 (2001).

FUTURE MEDICAL EXPENSES

MODIFICATION OF AWARD

STATUTE OF LIMITATIONS

The Supreme Court reversed the Court of Appeals affirmance of the trial court's dismissal of plaintiff's claim.

In 1996, plaintiff was awarded benefits for a 1994 injury based on stipulations of the parties. The last payment by defendant was in 1996. In 1999, plaintiff sought medical care and the physician opined that plaintiff's current problems were continuations of the 1994 injury. Defendant refused to pay the medical bill based on the statute of limitations, and plaintiff filed a petition. The trial court dismissed the claim as barred by the two-year statute of limitations under §48-137. The review panel and Court of Appeals affirmed the dismissal.

The Supreme Court identified two issues: (1) whether the compensation court has authority to order future medical expenses incurred more than two years after the accident or last payment, and (2) whether §48-137 bars a claim made more than two years after the accident or last payment where there has been an award from the compensation court. The Court first looked to the operative language of §48-120(1): "The employer is liable for all reasonable medical services . . . which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . ." Recognizing that the disabling effects of a permanent disability may continue after entry of an award, the Court held that §48-120 should be construed to accomplish the beneficent purposes of the act. The only limitation is that the treatment be reasonably necessary - without regard to any time limitation. Based on this interpretation as well as the legislative history of §48-120, the Supreme Court concluded that the compensation court is authorized to award future medical benefits incurred more than two years after the accident or last payment. The Court emphasized, however, that there must be a stipulation or evidence in the record to show that such treatment is reasonably necessary.

Regarding the second issue, plaintiff argued his claim was not barred because he complied with §48-137 by filing a petition. The trial court found that the statute of limitations applies to all cases, even those where a petition was filed. The Supreme Court disagreed. When a petition has been filed within two years of the accident and there has been an award, as in this case, the statute of limitations does not apply because the requirements of §48-137 have already been met. However, the Court explained, a claim for additional benefits relating to the same accident is barred under §48-140 and §48-141, whether it is brought within two years of the last payment or not. Those statutes provide that an award is final and not subject to readjustment unless there is an increase or decrease in incapacity. Therefore, the instant case required a determination of whether the plaintiff was seeking additional benefits for his injury, or whether the claim was covered by the 1996 award. The parties had stipulated and the court ordered, "defendants shall still be liable to pay to or on behalf of the plaintiff all reasonable and

necessary medical expenses resulting from said injuries." Neither placed a time limitation on incurring the medical expenses. Therefore, the award subjected defendant to liability for all reasonable medical expenses - past and future. The Court concluded that plaintiff was asking the compensation court to enforce the 1996 award by exercising its continuing jurisdiction over medical benefits, rather than attempting to modify a final award. The cause was thus remanded to the compensation court for a determination on whether the medical expenses were reasonable and necessary.

2. Frauendorfer v. Lindsay Manufacturing Company, 263 Neb. 237, 639 N.W. 2d 125 (2002).

REBUTTABLE PRESUMPTION OF CORRECTNESS

TEMPORARY PARTIAL DISABILITY

The Supreme Court found that the evidence was sufficient to support the trial court's award of temporary partial and permanent total disability benefits.

Plaintiff sustained a back injury and underwent surgery. Eventually he returned to light-duty work at reduced pay and/or hours. After plaintiff reached maximum medical improvement, defendant offered him a position within his restrictions. Plaintiff did not respond due to his physical limitations and use of narcotic analgesics for pain. Prior to trial, the parties stipulated to the exhibits and agreed on a vocational rehabilitation counselor. The trial judge awarded temporary and permanent indemnity benefits, and the review panel affirmed.

Defendant argued that the court erred in awarding temporary partial disability because there was no medical evidence restricting plaintiff from working less than an eight-hour day during the applicable period. The Supreme Court disagreed, stating that the issue was not plaintiff's impairment, but the extent of his disability. Disability, in contrast to impairment, is an economic inquiry that can be determined only within the context of the personal, social, or occupational demands that the individual is unable to meet as a result of injury. *Phillips v. Industrial Machine*, 257 Neb. 256, 278, 597 N.W. 2d 377, 392 (1999). In awarding temporary partial disability, the trial court relied on the plaintiff's testimony and the vocational rehabilitation counselor's opinion regarding his temporary earning power loss. The Supreme Court found the evidence was sufficient to support the trial court's finding of 30 percent temporary partial disability.

Defendant also argued the trial court erred in finding the plaintiff permanently and totally disabled, claiming that the court failed to give the agreed-upon counselor's LOEP evaluation the presumption of correctness required by §48-162.01(3). The agreed-upon counselor opined that the plaintiff's LOEP was 30 - 60 percent. The rebuttal LOEP evaluation found the plaintiff to be permanently and totally disabled based on his physical limitations, eighth grade education, and lack of transferable skills at age 55. The Supreme Court noted that although the trial judge did not specifically state that the presumption had been rebutted, he did make specific findings on it. The trial judge considered the LOEP evaluations, the medical evidence, and plaintiff's testimony, and stated "the court does not believe the plaintiff is employable . . . and finds the [rebuttal LOEP] opinion . . . persuasive." Thus, the judge's findings were sufficient to show that the presumption of correctness had been considered and rebutted, and he was not clearly wrong in concluding plaintiff was permanently totally disabled.

3. Green v. Drivers Management, Inc., 263 Neb. 197, 639 N.W.2d 94 (2002).

PERMANENT PARTIAL DISABILITY

EXPERT OPINIONS

VOCATIONAL REHABILITATION

NUNC PRO TUNC

The Supreme Court affirmed the Court of Appeals finding on permanent partial disability benefits, but reversed with respect to plaintiff's entitlement to vocational rehabilitation benefits.

The parties stipulated that plaintiff sustained a work-related back injury even though no physician had assigned a permanent impairment rating or given him permanent physical restrictions. The trial court relied on plaintiff's testimony at trial to determine he had suffered a 50 percent loss of earning capacity. The Supreme Court agreed with the Court of Appeals holding that an employee must prove his injury caused permanent impairment of his body as a whole before permanent partial disability benefits can be awarded. A workers' compensation award cannot be based on mere possibility or speculation, and if an inference favorable to the plaintiff can only be reached on the basis thereof, he or she cannot recover. *Green v. Drivers Mgmt., Inc.*, 10 Neb. App. 299, 634 N.W.2d 22 (2001). Thus, the trial judge's award of permanent disability benefits was vacated.

Regarding vocational rehabilitation benefits, the Supreme Court noted that pursuant to §48-162.01, a showing must be made that the employee is unable to perform suitable work in order to establish entitlement to such benefits. In the instant case, there was no finding that plaintiff had sustained any permanent impairment or restrictions. Without impairment or restrictions, there can be no disability, and without disability a worker is fully able to return to any employment for which he was fitted before the accident. Therefore, the Court of Appeals and compensation court erred as a matter of law in finding plaintiff was entitled to vocational rehabilitation.

Finally, the trial judge had amended her award through an order nunc pro tunc to allow plaintiff to recover future medical benefits. The Court of Appeals vacated, and the Supreme Court agreed. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered. *Fay v. Dowding, Dowding*, 261 Neb. 215, 623 N.W.2d 287 (2001). Because nothing in the original award indicated that the trial judge intended to grant plaintiff future medical benefits, she erred in modifying her award to allow recovery of such benefits.

4. Rodriguez v. Monfort, Inc., 262 Neb. 800, 635 N.W.2d 439 (2001).

LOSS OF EARNING POWER

VOCATIONAL REHABILITATION PLAN

REBUTTABLE PRESUMPTION OF CORRECTNESS

The Supreme Court reversed the review panel and Court of Appeals finding that the vocational rehabilitation counselor's opinions were entitled to a rebuttable presumption of correctness, and remanded for an affirmance of the trial court's award of vocational rehabilitation benefits.

The relevant facts in this case were undisputed at trial. The court-appointed vocational rehabilitation counselor opined that no vocational rehabilitation services were necessary, as plaintiff had been reassigned to a new position with defendant that was within his restrictions. The counselor further determined that a loss of earning capacity report was not appropriate because plaintiff's injury was to a scheduled member rather than the body as a whole. The trial judge awarded vocational rehabilitation services based on plaintiff's testimony that his new position caused him pain, and that he did not believe he could continue to perform the job. The counselor's reports were not referenced or discussed in the award. The review panel and Court of Appeals reversed, concluding that the opinion of the court-appointed counselor was entitled to a rebuttable presumption of correctness pursuant to §48-162.01(3). Furthermore, the trial judge failed to state his rationale for rejecting said opinions as required by Rule 11 of the compensation court's Rules of Procedure.

On appeal, the Supreme Court stated the question presented was one of statutory construction. The Court first observed that §48-162.01(3) creates two rebuttable presumptions: one with respect to the vocational rehabilitation plan, and another for the loss of earning capacity opinion. In this case, the Court found that no "plan" was developed because there was no detailed formulation of a program of action. Thus there was no "plan" to which a presumption could attach, and the trial judge properly awarded vocational rehabilitation services. Next, the Supreme Court explained that the Court of Appeals had improperly attached the presumption pertaining to loss of earning opinions. The Court of Appeals relied on *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999) to find that when the loss of earning capacity evaluation process results in a conclusion that there is no loss of earning power, the opinions in connection with that conclusion are entitled to the statutory presumption. The Supreme Court pointed out, however, that in *Variano*, the vocational rehabilitation counselor had written a series of inconsistent loss of earning capacity reports, and the final letter in that process was entitled to the §48-162.01(3) presumption of correctness regarding loss of earning capacity opinions. In contrast, the counselor in the instant case never evaluated the plaintiff or expressed an opinion regarding his loss of earning capacity, stating only that a loss of earning capacity assessment was "not warranted." The Supreme Court held that the counselor properly declined to provide a loss of earning capacity assessment. Therefore, there was no loss of earning capacity opinion to which the trial court could have assigned a rebuttable presumption of correctness, and the appeal court erred in finding that such a presumption applied to the counselor's opinions.

5. Schwan's Sales Enters. V. Hitz, 263 Neb. 327, 640 N.W. 2d 15 (2002).

SECOND INJURY FUND LIABILITY

OBVIOUS PERMANENT DISABILITY

WRITTEN RECORDS PROVISION

The Supreme Court reversed the review panel and upheld the trial court's decision that the Second Injury Fund was liable.

At the time plaintiff was hired by defendants, he had an amputation to his right leg below the knee. According to the undisputed record, the employer's sales manager who interviewed and hired plaintiff observed that he had a slight limp. Plaintiff explained that he had an amputation and used a prosthesis. The employer investigated before hiring plaintiff and found he was able to drive under the Federal Department of Transportation guidelines. However, defendant did not make a written record at that time documenting the amputation. Several months after he was hired, plaintiff slipped and fell while working for the employer. He suffered fractures to his right femur that required multiple surgeries.

At trial, the Fund argued it was not liable because the defendants never established a written record of plaintiff's amputation. In order to qualify under §48-128, employers must establish a written record of an employee's pre-existing permanent partial disability at the time the employee is hired or after the employer acquires knowledge of the pre-existing disability. The Supreme Court disagreed with the Fund. Even though the employer failed to make a written record of the amputation, they had actual knowledge of plaintiff's condition at the time of hire. Under *Akins v Happy Hour, Inc.*, 209 Neb. 236, 306 N.W. 2d 914 (1981), when the evidence is undisputed that an employer had actual knowledge of an obvious pre-existing permanent partial disability at the time of hire, the written records provision of §48-128 does not apply. In the instant case, the plaintiff had an obvious limp on the day he was hired and the employer had actual knowledge of the disability. The fact that a prosthesis made the amputation less noticeable did not mean the employer lacked actual knowledge of the condition. Therefore, the Supreme Court reversed the review panel and upheld the trial judge's finding that the Fund was liable.

6. Skinner v. Ogallala Public School District No. 1, 262 Neb. 387, 631 N.W.2d 510 (2001).

SUMMARY JUDGMENT

ARISING IN THE COURSE OF EMPLOYMENT

EXCLUSIVE REMEDY

The Supreme Court affirmed the district court's decision to grant plaintiff's motion for summary judgment finding that plaintiff's injury did not arise "in the course" of her employment; therefore, the Nebraska Workers' Compensation Act ("NWCA") did not apply.

Plaintiff was a special education teacher for defendant school district. Her husband was the band director. While helping her husband return some borrowed computer equipment to the school's band room one evening, plaintiff was injured when she fell through an open trap door in the floor. The trap door was open to allow a crew to string computer cable throughout the school, but no warning had been posted near the opening.

Defendant argued that plaintiff's exclusive remedy was under the NWCA. Furthermore, because plaintiff accepted workers' compensation checks from the insurer, defendant argued they were released from all claims pursuant to §48-148. The Supreme Court first determined whether the NWCA applied. The Court looked to the facts of *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 340 N.W.2d 4 (1983) and *Levander v. Benevolent and Protective Order of Elks*, 257 Neb. 283, 596 N.W.2d 705 (1999) for guidance in determining whether plaintiff was acting in the course of employment when helping a coworker. In *Levander*, plaintiff was found to be a volunteer rather than an employee when she was injured while grilling burgers for a tournament as a member of the Elks lodge. In contrast, the plaintiff in *Brown* was found to be an employee even though he was not on the clock at the time of injury, but was helping coworkers dig postholes for the employer. The Court found the facts of *Levander* more analogous to the instant case because on the date of injury school was not in session, it was late in the evening, and plaintiff testified that she would not have made a special trip to the school to assist a coworker other than her husband. Therefore, the Court determined that plaintiff was not acting within the course of her employment and that the NWCA did not apply. The Court then addressed the duty owed by defendant to plaintiff. It concluded that plaintiff was a business invitee because she provided some benefit to the defendant at the time of injury that implied an invitation under the economic benefit test. As a result, plaintiff was entitled to bring a tort claim against defendant.

A concurring opinion addressed the dissent's concern about the apparent conflict in a finding that plaintiff was performing activities related to employment sufficient to render her a business invitee while at the same time not acting in the course of her employment for purposes of the NWCA. The concurring justice explained that because plaintiff's activities in the school building immediately prior to her injury were of some benefit to the defendant as owner of the premises, she occupied the status of an invitee under the law then in effect. However, because the evidence revealed that plaintiff's injury occurred at a time when she was acting in a purely personal capacity, the injury did not occur "in the course of" her employment.

7. Thornton v. Grand Island Contract Carriers, 262 Neb. 740, 634 N.W. 2d 794 (2001).

STATUTE OF LIMITATIONS

FUTURE MEDICAL EXPENSES

MODIFICATION OF AWARDS

STIPULATIONS

The Supreme Court upheld the trial court's dismissal of plaintiff's claim for medical expenses in spite of the trial judge's misapplication of the statute of limitations as the basis for his conclusion.

Plaintiff filed a petition on June 4, 1999 claiming medical expenses and attorney fees arising from his August 24, 1988 accident. In a 1992 award for the same accident, defendants were given credit for payment of all medical bills incurred to date, but the award was silent as to defendants' liability for future medical expenses. In response to the 1999 petition, defendants filed a motion for summary judgment based on the statute of limitations, as the last payment had been made on June 19, 1995. The trial judge sustained the motion and entered a dismissal. His decision was based on *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W. 2d 662 (1997) which held that the two-year limitation under §48-137 takes precedence over §48-120(1) (the requirement that an employer pay medical expenses as and when needed.) On appeal, however, the Supreme Court looked to the more recent *Foote vs. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001) as the controlling authority.

In both *Foote* and the instant case, the employee was attempting to obtain payment of medical expenses more than two years after the last payment of compensation. In *Foote*, plaintiff had filed a petition and an award was entered; therefore, the requirements under §48-137 were satisfied and the statute of limitations did not act as a bar to the claim. The Court went on to expressly state that the compensation court does have authority to order payment of future medical expenses incurred more than two years after the accident or last payment. Under §48-140, the award in *Foote* was final and not subject to readjustment because there was no increase or decrease in plaintiff's incapacity. However, that award specifically stated plaintiff was entitled to payment of future medical expenses. This was the operative language and plaintiff was therefore entitled to continuing payment of medical expenses. The only limitation was that such expenses be reasonable and necessary.

In the instant case, the award contained no language allowing for payment of future medical benefits. While plaintiff's claim was not barred by the statute of limitations, it was an attempt to obtain additional benefits relating to the same accident. Because there had been no increase or decrease in incapacity, plaintiff's claim was barred instead by §48-140.

The Supreme Court also noted that even though the parties in the pending matter had entered into a stipulation that stated that plaintiff was awarded future medical benefits, such stipulation had no effect. The general rule is that the parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded. See *Struve Enter. v. Travelers Ins. Co.*, 243 Neb. 516, 500 N.W.2d 580 (1993).

8. Vonderschmidt v. Sur-Gro, 262 Neb. 551, 635 N.W. 2d 405 (2001).

ACCIDENT

DISCONTINUATION OF EMPLOYMENT

SUDDENLY AND VIOLENTLY

The Supreme Court reversed the Court of Appeals decision that had remanded the cause with directions to dismiss.

Plaintiff claimed a left knee injury while operating a commercial fertilizer spreader with a clutch that was later found to be mechanically defective. In 1996 plaintiff began treating with his family physician who prescribed medication but did not restrict plaintiff's work activities. Plaintiff returned to work but did not use the spreader again until 1997, after which his knee pain returned necessitating medical treatment. Physicians provided restrictions, including refraining from operating a vehicle with a heavy clutch. Physicians also found plaintiff to have a permanent impairment to his lower extremity.

The trial court found that plaintiff sustained an injury to his knee and awarded permanent benefits. The court also found that plaintiff experienced some periods of temporary disability after the recurrence in 1997, but did not award temporary benefits. The review panel affirmed, and ordered defendant to pay attorney fees. The Court of Appeals reversed, finding that plaintiff had not suffered an accident as defined by §48-151(2) and *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W. 2d 411(1999). It opined that the "discontinuation of employment" required by *Jordan*, meant something more than missing a few hours of work to attend medical appointments.

On further appeal, the Supreme Court found that while the "suddenly and violently" element of §48-151(2) requires discontinuation of employment, it does not define a minimum amount of time for such discontinuation. According to the Court, the controlling factor is not the length of the time, but whether the employee stopped work and sought medical treatment. In the instant case, the record established there was an identifiable point in time when the plaintiff missed work to seek medical treatment. Therefore, the Court of Appeals erred in reversing the compensation court's award of benefits. The cause was remanded to the appeal court with directions to affirm the judgment of the review panel.

The concurring opinion stated that while the discontinuance of employment may be for the purpose of seeking medical treatment, it need not be only for that purpose.

Court of Appeals Cases (Designated for Permanent Publication):

1. Everson v. O'Kane, 11 Neb.App.74, 643 N.W.2d 396 (2002).

STATUTE OF LIMITATIONS

JUDICIAL NOTICE

The Court of Appeals reversed the compensation court's dismissal of plaintiff's petition and remanded the cause for a new trial with directions that all evidence upon which the trial judge based his decision be included in the bill of exceptions.

Prior to trial the parties stipulated, among other things, that plaintiff was injured in an automobile accident and that defendant had not filed a first report of injury. At trial, the judge took judicial notice of a first report of injury in the court's file and stated the case was being dismissed because the statute of limitations had run. Plaintiff's counsel attempted to argue that the first report in the judge's file was merely a "dummy report" created by the court - not the first report required under §48-144.01. In spite of efforts by plaintiff's counsel to have the dummy report marked and included as an exhibit, the trial judge failed to do so.

The Court of Appeals acknowledged that a court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the same case or a related case. See *Wolgamott v. Abramson*, 5 Neb.App. 478, 560 N.W.2d 859 (1997). The Court noted further however, that papers requested to be noticed must be marked, identified, and made a part of the record. See *In re Interest of C.K., L.K., and G.K.*, 240 Neb. at 700, 484 N.W.2d at 68 (1992). A trial court's ruling should state and describe what it is the court is judicially noticing, otherwise a meaningful review is impossible. *Id.* In the instant case, the Court of Appeals stated that it was impossible to ascertain whether defendant or someone on his behalf filed the first report in question, nor whether the report satisfied §48-144.01 such that it tolled the statute of limitations. Because the record left pertinent fact questions unanswered, the cause was reversed and remanded for a new trial with directions that the judicially noticed evidence be included in the bill of exceptions.

2. Delgado v. IBP, Inc., 11 Neb.App. 165, 645 N.W.2d 831 (2002).

FINAL ORDER

PLEADINGS

The Court of Appeals vacated the order of the review panel with directions to dismiss the appeal from the trial court because the panel lacked jurisdiction to hear an appeal from a nonfinal order.

The trial court awarded temporary and permanent disability benefits plus payment of certain medical expenses. The judge made no findings concerning plaintiff's right to vocational rehabilitation benefits, penalties, interest, or attorney fees. The review panel concluded that the trial judge's failure to mention these benefits indicated he found no merit in those claims, and there was evidence to support such a finding. The panel remanded the case, however, for a reasoned decision regarding plaintiff's loss of earning power. Plaintiff appealed.

A review panel's order affirming in part and reversing and remanding in part has previously been found to be an appealable order. *Underwood v. Eilers Machine & Welding*, 6 Neb. App. 631, 575 N.W. 2d 878 (1998). However, an appeal may not be taken from an order of the compensation court if that order is not a final order, as interpreted by the Supreme Court. *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W. 2d 368 (1999). Therefore, the issue to be decided was whether the trial court's order was a final order.

The Court of Appeals stated that the function of pleadings is to inform the court of the issues submitted for decision. In this case, the amended petition and answer informed the court of the issues, and there was nothing in the bill of exceptions that amended or changed the relief sought. The petition stated that vocational rehabilitation benefits were in dispute, but the trial court did not rule on that issue. The issue may not have been presented, but the rule requiring the trial court to decide all issues before an order becomes final still applied. According to the Court of Appeals, it was clear the trial judge did not directly rule upon the claims for rehabilitation benefits, interest, penalties, or attorney fees; therefore, the order was not final. The Court was unwilling to accept the review panel's interpretation that the trial judge made an implied ruling on those issues. Rather, it was impossible to know whether the trial judge intended an implied denial or simply forgot to rule on an issue. If faced with issues pled but not litigated, the best procedure for the trial court would have been to ascertain on the record whether an issue had been abandoned, or find against the plaintiff and deny relief on those issues.

3. Hale v. Vickers, 10 Neb. App. 627, 635 N.W. 2d 458 (2001).

REFUSAL OF MEDICAL EXAMINATION

REASONABLE CONTROVERSY

MEDICAL FEE SCHEDULE

The Court of Appeals affirmed the trial court's award of benefits, penalties and attorney fees with a modification to specify the amount of the penalty.

Plaintiff twisted his knee at work and elected to have surgery. Defendant learned of the surgery a week before it was scheduled and requested that plaintiff submit to an examination by a doctor of their choosing. Plaintiff agreed, but refused to postpone the surgery to attend the examination. The surgery was performed and plaintiff did not attend the §48-134 exam. After defendant denied the claim, plaintiff submitted to the exam. The trial court found plaintiff's knee injury compensable and awarded benefits plus penalties and attorney fees. The review panel affirmed the trial court's findings in all respects.

On appeal, defendant argued that plaintiff's behavior constituted a refusal to submit to a medical examination under §48-134 that created a reasonable controversy regarding compensability. Therefore, waiting-time penalties and attorney fees should not have been awarded. The Court of Appeals first noted that §48-134 does not allow a complete denial of benefits. Rather, the employee may be deprived of compensation only during the continuance of such refusal. The Court went on to clarify that, contrary to defendant's suggestion, the question of whether an employee's claim is compensable stands separate from whether he can be deprived of compensation under §48-134. In this case, there was no evidence that plaintiff refused to undergo an examination - only that he refused to postpone his surgery to do so. There was also no evidence that because plaintiff had surgery, an employer-furnished physician was prevented from rendering opinions on causation and necessity of surgery. Thus, plaintiff's behavior did not rise to the level of an unreasonable refusal, defendant was not prejudiced by such behavior, and the trial court properly held that no reasonable controversy existed.

Defendant also argued that the existence of conflicting impairment ratings created a reasonable controversy. The Court of Appeals, citing *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 905, 448 N.W. 2d 591, 594(1987), restated the rule that an employer is responsible for paying benefits when the presence of disability is undisputed. Here, there was no controversy as to whether defendant owed at least the amount due for the lowest among the leg impairments given. Defendant failed to pay any compensation, and was therefore subject to penalty. Because the trial court's order did not state the amount of the penalty, the Court of Appeals modified the order to specify the correct amount.

Finally, defendant argued that the compensation court erred by failing to order that medical expenses be paid pursuant to the fee schedule as required by §48-120. The Court of Appeals noted that defendant did not object to the medical expenses at trial nor did they introduce any of their own evidence regarding same. Since defendant failed to contest the issue at trial, they could not do so at the appellate level.

4. Hamm v. Champion Manufactured Homes, 11 Neb.App. 183, 645 N.W.2d 571 (2002).

FINAL APPEALABLE ORDER

JURISDICTION

The Court of Appeals vacated the decision of the review panel, holding that the appeal from the trial court was a nonfinal, nonappealable order. Therefore, the review panel lacked jurisdiction to hear it and the cause was remanded with directions to dismiss.

The trial court found plaintiff was entitled to indemnity benefits and future medical care, but could not determine what medical expenses and mileage were due because the evidence was unclear. The trial judge set a further hearing to sort out those issues. Defendant appealed to the review panel prior to the further hearing date. The review panel affirmed the trial court's award in part, but remanded for a determination of liability for medical expenses and mileage based on evidence submitted to the trial court.

On its own motion, the Court of Appeals identified a jurisdictional question as the primary issue. It noted first that §48-179 provides for appeals from findings, orders, awards, or judgments while §48-182 provides for appeals from final orders. However, the workers' compensation statutes fail to define a final order for purposes of an appeal to the review panel. Therefore, the Court looked to the types of orders defined in §25-1902. It concluded that the trial judge's order most closely resembled an order affecting a substantial right made in a special proceeding. The instant case presented jurisdictional implications of an order in a special proceeding that failed to decide all the issues submitted to the court in that proceeding. See *Paulsen v. Paulsen*, 10 Neb.App. 269, 634 N.W.2d 12 (2001). When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding, and the court decides some of the issues while reserving others for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990). Because the trial court did not resolve the amounts of medical or mileage expenses due but reserved them for later determination, the order from the trial court was a nonfinal order. Thus, the review panel had no jurisdiction to hear the case and its order modifying the trial court's decision was vacated. The appeal to the Court of Appeals was dismissed with instructions that the review panel dismiss the appeal from the trial court.

5. Hoffart v. Fleming Cos, 10 Neb.App. 524, 634 N.W.2d 37 (2001).

MOVING EXPENSES

PERMANENT PARTIAL DISABILITY

The Court of Appeals affirmed the compensation court's decision regarding the extent of plaintiff's permanent impairment, but reversed the lower court's denial of plaintiff's relocation expenses.

Plaintiff sustained a frostbite injury and subsequent infection to his foot while working in a warehouse freezer. The trial judge found that plaintiff suffered a 50 percent permanent partial disability to his foot, but declined to award moving expenses of \$1,604.21 for plaintiff's relocation to a warmer climate. The review panel affirmed. On appeal, plaintiff claimed the compensation court erred in failing to find that his impairment was 82 percent to the foot, as opined by the treating physician. In arriving at this figure, the treating physician had taken into consideration that plaintiff experienced vascular compromise when exposed to cold temperatures. The doctor also recommended that plaintiff relocate to a warmer climate. Plaintiff cited *Kalhorn v. City of Bellevue*, 227 Neb. 880, 420 N.W.2d 713 (1988) to advance the argument that permanent partial disability benefits should be based on the condition of an employee's injury in its uncorrected state, i.e., a cold environment. Defendants argued that plaintiff's cold intolerance should not have been considered, and that his impairment was 24 - 25 percent as opined by two other physicians.

The appeal court first noted that the extent of permanent impairment is a question of fact - not law; therefore, *Kalhorn* did not control the result. In the instant case, the trial judge did not adopt either of the conflicting impairment ratings. Based on its review of the record, the appeal court could not say that the compensation court was clearly wrong in finding that plaintiff suffered a 50 percent loss of use of his right foot. With regard to his claim for moving expenses, plaintiff relied on *Newberry v. Youngs*, 163 Neb. 397, 80 N.W.2d 165 (1956) which held that under §48-120, an employer is liable for the costs of travel incident to and reasonably necessary to obtain reasonable medical and hospital services. Plaintiff also cited *Koterzina v. Copple Chevrolet*, 1 Neb.App. 1000, 510 N.W.2d 467 (1992) in which the appeal court ordered reimbursement of construction expenses to make the employee's home handicapped-accessible. After reviewing the holdings in several other jurisdictions, the Court concluded that the tight causal connection between injury, residual effects of the injury, and a warmer climate, coupled with its duty to liberally construe the Act compelled a finding that the moving expenses were compensable under §48-120. The Court emphasized, however, that it focused on the unique facts presented by the nature of a cold injury, the resulting susceptibility to additional injury from living in a cold climate, and the undisputed benefit of relocating. The trial judge's denial of benefits was therefore reversed, and the cause remanded for a finding as to whether the moving expenses claimed were reasonable. In addition, plaintiff was awarded approximately 40 percent of the attorney fees requested since plaintiff succeeded in only one of two claims made.

6. Smith v. Goodyear Tire and Rubber Co., 10 Neb. App. 666; 636 N.W.2d 884 (2001).

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

PHYSICAL THERAPY

VARIANCE - PLEADINGS AND EVIDENCE

The Court of Appeals reversed the review panel and trial judge, and found that an injury plaintiff sustained while undergoing physical therapy was compensable.

Plaintiff suffered work-related injuries to his back and elbow for which defendant accepted compensability. He was referred to physical therapy for treatment. Eventually the physical therapist recommended that plaintiff increase his usage of a particular physical therapy machine, a stair stepper. When plaintiff did so he started feeling pain in his left knee. Plaintiff was later diagnosed with an advancement of his pre-existing chondromalacia and a new medial meniscus tear for which he underwent surgery.

Defendant argued that plaintiff failed to satisfy the second prong of §48-101 because the injury did not arise "in the course of" plaintiff's employment, i.e., plaintiff was pursuing exercise and rehabilitation, rather than work duties when the knee injury occurred. The Court of Appeals conceded that plaintiff's physical therapy was outside the time and space limits of his employment. However, the Court went on to base its analysis on the concept of "quasi-course of employment." Citing Larson's treatise and case law from other jurisdictions, the Court described quasi-course of employment injuries as follows: "[A]ctivities undertaken by the employee following his or her injury which, although they take place outside the time and space limits of the employment, and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury." See 1 Arthur Larson and Lex K. Larson, *Larson's Workers Compensation Law* §10.05 at 10-11(2001). Therefore, the question became whether plaintiff's physical therapy was related to his employment in the sense that it was a necessary or reasonable activity that plaintiff would not have undertaken but for his back and elbow injuries. The Court found that it was, therefore the trial court erred in dismissing the claim.

As an alternative argument, defendant alleged that plaintiff could not recover because he failed to plead his back and elbow injuries in his petition. The Court of Appeals dismissed this argument because the pleadings did not fail to advise the employer of the issues to defend, and the employer was not misled by the variance between the pleadings and the evidence. See *Hayes v. A.M. Cohran, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987). The Court reversed and remanded for further proceedings consistent with its opinion.

7. Zavala v. ConAgra Beef Co., 11 Neb. App. 235, 647 N.W.2d 656 (2002).

VOCATIONAL REHABILITATION

STACKING OF MEMBER AND NONMEMBER IMPAIRMENTS

The Court of Appeals reversed and remanded with directions for reconsideration of plaintiff's entitlement to vocational rehabilitation in light of its holding that stacking of a member impairment with a whole body injury is permissible in determining loss of earning capacity.

The trial court awarded plaintiff permanent partial disability benefits for her right upper extremity injury and whole body impairments plus vocational rehabilitation benefits. The court-appointed vocational rehabilitation counselor opined that plaintiff was an odd lot worker and was permanently totally disabled. A rebuttal opinion criticized the first counselor's methodology of combining or "stacking" the member and nonmember injuries, and concluded that plaintiff was less than permanently totally disabled. The trial judge mentioned the stacking of impairments and found that the court-appointed counselor's opinion was rebutted. However, the judge did not clearly state whether the opinion was rebutted based on a rejection of stacking, or based on a factual finding that plaintiff was not an odd-lot worker, or both. The review panel affirmed the award in regard to the whole body and upper extremity injuries. However, the panel reversed the award of vocational rehabilitation benefits, finding that plaintiff's modified employment with the employer was terminated because of an altercation with a co-worker rather than her inability to perform her assigned work. The review panel also made a finding that stacking was impermissible.

The Court of Appeals looked to one of its prior unpublished opinions, *Payzant v. Coufal Lumber Co.*, No. A-00-083, 2000 WL 1790027 (Neb.App. Dec. 5, 2000), to conclude that stacking is permissible. As further support, the Court noted the apparent approval of stacking by the Supreme Court in *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999). Finally, the policy of liberal construction of the Workers' Compensation Act for the benefit of the claimant favors a view of §48-121 which allows that which is not directly prohibited, i.e., stacking to arrive at a true assessment of the claimant's employability. The appeal court also pointed out that a reversal was necessitated because the trial judge failed to explain the basis for her finding that the court-appointed counselor's opinion had been rebutted, as required by Rule 11 of the compensation court's Rules of Procedure. Therefore, both the trial judge and review panel were reversed with instructions that the trial judge reconsider entitlement to vocational rehabilitation.